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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] '19

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation,

Appellants,

vs.

W. C. JACOBSEN, Director of the Department of Agriculture of the State of California, GOODWIN J. KNIGHT, Governor of the State of California, and EDMUND G. BROWN, Attorney General of the State of California,

Appellees.

On Appeal From the United States District Court for the Northern District of California, Northern Division

APPELLANTS' JURISDICTIONAL STATEMENT

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Appellees.

On Appeal From the United States District Court for the Northern District of California, Northern Division

APPELLANTS' JURISDICTIONAL STATEMENT

Opinion of District Court

On December 17, 1958, the three-judge District Court filed a "Memorandum and Order" dismissing the action for want of jurisdiction. (Appendix I, *infra*, Ap. 1.) This opinion is not reported.

Jurisdiction of the Appeal

Nature of proceeding: Appellants, "handlers" of avocados grown in Florida, seek declaratory judgment and injunction to restrain the state officers of California from

continuing to enforce against them the provision of section 792 of the Agricultural Code of California prohibiting sale in that state of avocados containing less than 8% oil content. (Appendix II, *infra*, secs. 784, 785 and 792 of Agricultural Code of California.)

Statute pursuant to which action is brought: The complaint invokes jurisdiction of the District Court pursuant to both sections 1331 and 1337 of the Judicial Code (28 U. S. C., secs. 1331 and 1337). Paragraph III of the complaint [R. 2] alleges that the matter in controversy is the right of appellants to market Florida avocados in California free from the 8% oil content restriction of section 792 of the Agricultural Code of California; that the controversy arises under the commerce clause of the United States Constitution, article I, section 8, clause 3, and the equal protection clause of section 1 of the Fourteenth Amendment, and that as to each of the appellants the matter in controversy exceeds the value of $3,000 exclusive of interest and costs. Further in the complaint it is alleged that California's 8% oil requirement, particularly when applied to the varieties of avocados preponderantly grown in Florida, has no scientific validity as a test of the maturity or quality of the fruit; that the varieties of avocados grown in Florida and marketed by appellants come to maturity with far lower oil content than the varieties preponderantly grown in California, due to difference in origin and growing conditions, but are not for that reason less wholesome or palatable; that the 8% oil content requirement for sale of avocados in California, when applied to avocados grown in Florida, operates as a virtual embargo against sale of the Florida avocados in the highly favorable California market, and that the protected home market thus afforded to the growers and handlers of California avocados gives them an arti-

ficial competitive advantage over the growers and handlers of Florida avocados in all markets. [Pars. XXII, XXIII, XXVIII, XXIX and XXXI of complaint, R. 10, 11, 13, 14.]

Jurisdiction of the District Court is invoked under 28 U. S. C. section 1337, also, in that the controversy arises under an Act of Congress regulating interstate commerce, namely, the Agricultural Marketing Agreement Act of 1937. [Par. IV of complaint, R. 3-4; Appendix III, *infra*, provisions of Marketing Agreement Act.] The complaint recites that on June 11, 1954, pursuant to agreement made by the Secretary of Agriculture with the growers and handlers of avocados in South Florida in the manner prescribed by the Agricultural Marketing Agreement Act of 1937, there became effective the Secretary's marketing order No. 969 (referred to as No. 69); that maturity and quality standards for the marketing of the avocados in interstate commerce were established by a series of orders issued by the Secretary from time to time, also inspection procedures to enforce said orders; that since June 11, 1954 appellants have been registered as handlers under marketing order No. 69 and all avocados handled by appellants have been marketed in compliance with the standards and procedures established pursuant to said order. [Pars. V to XIII and XXIV (a) of complaint, R. 3-7, 11; also Exs. A, B and C attached to complaint, R. 17-24.] Appellants pray for an adjudication that prohibition of delivery and sale in California of avocados grown in Florida and shipped in interstate commerce in compliance with the orders and regulations made by the Secretary of Agriculture, acting pursuant to the authority vested in him by the Agricultural Marketing Agreement Act of 1937, is an impermissible nullification of the power exercised by Congress under

article I, section 8, clause 3 of the Constitution of the United States to regulate commerce among the states. [Par. XXX and prayer C of complaint, R. 14, 15.]

The complaint alleges that no practical or adequate remedy is available to appellants in the premises save by the equitable process of injunction [Par. XXXII, R. 15] and prays for a hearing of the case by a three-judge court, as provided by 28 U. S. C. sections 2281 and 2284.

Date of judgment and notice of appeal: Judgment dismissing the action for want of jurisdiction and awarding costs to appellees was entered January 13, 1959. [R. 175.] Notice of appeal was filed by appellants February 12, 1959, in the office of the clerk of the United States District Court, Northern District of California, Northern Division. [R. 216.]

Statutory provision for appeal: The appeal is taken pursuant to 28 U. S. C. section 1253. [Notice, R. 216.]

Cases sustaining jurisdiction: The recent decisions in *Ivers v. Dwyer*, 79 S. Ct. 178, and *Doud v. Hodge*, 350 U. S. 485, and 354 U. S. 457, are believed to sustain jurisdiction of this appeal.

In *Ivers v. Dwyer* the appellant brought suit in the United States District Court for the Western District of Tennessee for declaratory judgment and injunction to restrain enforcement against him and others similarly situated of a Tennessee statute requiring buses to provide segregated seating arrangement for passengers according to race. Appellant, a negro passenger, refused to comply with a direction to seat himself in the space in a Memphis bus assigned to colored passengers and left the bus when threatened with arrest for his refusal. The three-judge District Court declined to pass upon appellant's claim that

the challenged statute violated his constitutional right, on the ground that the complaint failed to present an "actual controversy," and entered a judgment of dismissal. This court held that the District Court erred in not proceeding on the merits, reversed the judgment of dismissal, and remanded the case for further proceedings in the District Court.

In *Doud v. Hodge* the appellants (in 350 U. S. 485) brought suit in the United States District Court for the Northern District of Illinois, under 28 U. S. C. 1331, for injunction to restrain enforcement against them by the state officers of the provisions of the Currency Exchange Act of Illinois, alleging that exemption from the provisions of the statute of persons selling American Express Company money orders was discriminatory and in violation of the equal protection clause of the Fourteenth Amendment. The three-judge District Court dismissed the complaint for want of jurisdiction, in the absence of a prior determination by the state courts of the validity of the statute. This court vacated the judgment and remanded the case to the District Court for further proceedings. On the remand, the case was heard on the merits and judgment was entered in favor of the plaintiffs (146 F. S. 887), whereupon this court entertained an appeal by the defendants and affirmed the judgment. (*Morey v. Doud*, 354 U. S. 457.)

Statute involved: The California statute here involved is section 792 of the Agricultural Code of California (Deering's Agricultural Code of California, 1950 edition and supplements). Section 792, together with enforcement provisions of the Agricultural Code, is set forth in Appendix II, *infra*, Ap. 10.

Question Presented by the Appeal

Did the District Court properly dismiss the action, without a hearing on the merits, for alleged want of jurisdiction of the subject matter?

The complaint was filed November 13, 1957. [R. 1.] Appellees filed a joint answer to the complaint, pleading five defenses, on December 6, 1957. [R. 20.] Thereupon, on February 24, 1958, appellants requested the court to set the action for early plenary trial, in lieu of an application for an interlocutory injunction. [R. 33.] Prior to the time of this motion, depositions of five witnesses had been taken at Miami, Florida, and numerous documentary exhibits marked for identification. [Vol. II of Record, original depositions and exhibits.] Interrogatories were propounded by appellants to appellee W. C. Jacobsen, Director of Agriculture of the State of California, and interrogatories were propounded by appellees to Harold E. Hall, president of appellant South Florida Growers Association, Inc., and to Fred Piowaty, secretary of appellant Florida Lime and Avocado Growers, Inc. [Interrogatories and answers, R. 35, 38, 54, 57, 148, 153.]

February 26, 1958, appellees filed a motion for an order allowing an agreed textual amendment of the complaint, also for leave to file an amended answer to the complaint pleading an additional defense. [R. 50.] While this motion was pending on appellants' objections to the filing of the proposed additional defense, appellees filed a motion directed to appellant Florida Lime and Avocado Growers, Inc. for dismissal of the action or alternatively for stay of proceedings "pending an authoritative interpretation of the challenged California statutes and regulations by the California courts." [R. 60.] A like motion was filed, directed to appellant South Florida Growers Association,

Inc. [R. 106.] Leave to file the amended answer to the complaint was granted March 20, 1958. [Order, R. 108; amended answer, R. 112.]

A three-judge court having been convened, a hearing was held April 18, 1958 on appellees' motions for dismissal or stay of the action. [R. 165.] Eight months later, on December 17, 1958, the court filed its memorandum dismissing the action. [R. 166; also Appendix 1, *infra*, Ap. 1.]

The motions to dismiss or stay the action were made not only on the pleadings, but also the depositions aforesaid and exhibits identified by the deposition witnesses, the answers to interrogatories, and the affidavit filed with the motions. [Motions, R. 60-61, 106-107; final judgment, R. 175-176.]

To the extent that the decision of the District Court is of factual nature, manifestly, it is based on incomplete evidence and on oral testimony and documentary exhibits never submitted or received in evidence. Thus, the question on appeal arises in part on evidentiary matter not screened or validated by rulings of the court and not a defensible basis for factual conclusions. [Appellants' memorandum in opposition to appellees' motions, R. 117-118.]

The gist of the District Court opinion is that there is no actual controversy between appellants and the state officers in charge of enforcement of the challenged statute because, on the occasions when appellants shipped avocados to California which failed to pass the 8% oil test, appellants availed themselves of leave to reship the fruit to neighboring states instead of submitting the fruit to destruction as a public nuisance, as provided in section 385 of the Agricultural Code of California. (Appendix II, *infra*, Ap. 6.) An "actual controversy" could arise, as

stated by the District Court, only if there were a co-existence of four facts: (1) the bringing of avocados to California by appellants; (2) failure of the avocados to meet the standards fixed by law; (3) refusal of appellants to recondition or remove the avocados, and (4) an election by appellants to contest abatement of the avocados as a public nuisance as provided by section 785. [R. 169-170, Appendix I, *infra*, Ap. 3-4.]

In an action in which no question is raised about California's method of testing oil content of avocados or regarding the correctness of the determination of oil content in any particular instance, but only a question of the constitutionality of the 8% oil requirement for sale of appellants' avocados in California, is it proper to remit appellants to a state court procedure of the kind provided by section 785 of the Agricultural Code of California? Even if this procedure could go beyond immediate destruction of the load of avocados determined to be of less than 8% oil content, as provided by section 785 in the case of perishable fruit such as avocados, and even if thereafter an issue of the constitutionality of the 8% oil requirement, when applied to appellants' avocados, could somehow be raised and litigated in a section 785 proceeding, may appellants be thus forever barred from litigating such judicial issue in the appropriate federal court?

Facts Material to the Question Presented

The District Court declared: "The past events on which this case is predicated are not of sufficient legal stature as to here and now create justiciable issues." [R. 170, Appendix I, *infra*, Ap. 4.] To what "past events" this

statement refers is not elucidated, except perhaps as appears from the prior statement that it is alleged "that plaintiffs have shipped loads of avocados into California, several of which were found not to conform to the standards imposed by section 792, and that these non-conforming loads were not reconditioned by substitution,* but were removed from the state and marketed elsewhere." [R. 108; Appendix I, *infra*, Ap. 2.]

Facts of the case showing that there exists an actual controversy between appellants and the state officers of California regarding the constitutionality of section 792 of the Agricultural Code of California, and that appellants have a real, immediate and substantial interest in the determination of the validity of the statute, include the following:

1. Each appellant is a handler of Florida-grown avocados in large volume, also a grower of avocados. [Pars. I and XIV of complaint, R. 1, 7.] The volume of avocados handled by appellants in the crop year 1954-55 and subsequent years appears in PX 18 and PX 20. Gross proceeds from sales of avocados are stated in

*Nowhere in the record of this case, so far as it has proceeded, is an explanation vouchsafed of the manner in which a load of Florida avocados, rejected in California because of less than 8% oil content, could be "reconditioned." To suggest that this could be done "by substitution" implies that the oil content of avocados can be judged visually, by external appearance, instead of laboratory analysis of macerated samples. ("Official method for the determination of oil in avocados," R. 109-104.) Also, this suggestion seems to carry an implied admission that the maturity of avocados can be satisfactorily judged by external factors, such as size or weight at time of picking, as is done for each season and each variety under the Florida marketing agreement. [Paragraph X of complaint, R. 5.]

answers to interrogatories [R. 150-152, 154-155], as follows:

	Florida Lime and Avocado Growers, Inc.	South Florida Growers Association, Inc.
1954-55	$205,432	$820,008
1955-56	323,143	993,400
1956-57	233,358	1,006,241
1957-4/1 to 12/31	165,390	(No figure available)

2. Approximately 50% of all the avocados grown in the United States* are consumed in California. [Estimates based on answers to interrogatories made by appellee W. C. Jacobsen, R. 35-37, 38-48.]

3. There is large demand for Florida avocados in California, particularly in the months of October, November, December and January, when the supply of California avocados is at its lowest and the supply of Florida avocados is at its highest. [Pars. XV and XVI of complaint, R. 7-8; deposition of Harold E. Kendall, pp. 183-189.]

4. The demand for Florida avocados in California has induced appellants to attempt to avail themselves of the California market despite the barrier of California's 8% oil requirement. Because of danger of rejection of California shipments by application of the 8% oil test, appellants have risked such shipments only after procuring oil tests (by the California official method) at the University of Florida's Sub-Tropical Experiment Station at Homestead, Florida, to ascertain whether such shipments could reasonably be expected to pass the 8% oil test. These tests revealed that only a minor part of the crop

*Avocados are grown commercially only in California and Florida.

ever attained 8% oil content, and then only a month to two months or more after attainment of maturity and marketability under the standards established by the Secretary of Agriculture. [PX 12 and 13; Depositions, pp. 164-175, 254-255.] Even as to varieties of Florida avocados that sometimes attained 8% oil content, tests made over the course of several years showed substantial variations from grove to grove, from tree to tree, and even from different sides of the same tree, so that there was no consistency or reliability as to oil content. [Depositions of Dr. Roy W. Harkness, pp. 94-100, also record of a vast number of avocado oil tests made by Dr. Harkness in a research project carried on from the fall of 1951 into the year 1955, identified collectively as PX 16.]

Notwithstanding the restrictive effect of the 8% oil test, appellants have continued their endeavors to meet the California demand for Florida avocados. The volume of appellants' sales of avocados in California appears in PX 18 and 20, also DX P, Q, R and S, and the dollar amount is stated in answers to interrogatories [R. 151-152, 155], as follows:

	Florida Lime and Avocado Growers, Inc.	South Florida Growers Association, Inc.
1954-55	$94,553.	$78,905.
1955-56	56,616.	129,543.
1956-57	26,332.	15,065.
1957-4/1 to 12/31	13,906.	11,861.

The deposition testimony and exhibits show that the California sales were made by appellants five to eight weeks or more after the marketing ~~of the avocados~~ began in compliance with the regulations under the marketing agreement; that because of the impossibility of meeting

the 8% oil test at an earlier time, and uncertainty of meeting the test at any time, appellants have been unable to avail themselves of orders for Florida avocados from large chain grocery stores in California because of inability to give assurance of day to day deliveries, in correlation with the promotional and advertising programs of these stores. [Deposition of Harold E. Kendall, pp. 183-186, 213-214, 226-227; also dates of shipments to California as shown by DX P, Q, R and S.]

5. Rejection of a shipment of Florida avocados in California, for failure to pass the 8% oil test, involves risk of substantial loss. Such shipments are made in refrigerated truckloads of 400 to 450 bushels, of value at destination of $4,000 to $5,000, depending upon the prevailing wholesale prices. [Par. XXV of complaint, R. 12; Depositions, pp. 216-221, 229.] Since the fruit is highly perishable, especially upon interruption of refrigeration, reshipment to another state entails hazard of large loss, as illustrated by appellants' past experience [Pars. XXVI and XXVII of complaint, R. 12-13; also PX 17 and PX 21, and depositions of Messrs. Kendall and Piowaty, pp. 175-182, 255-259, 274.]

In addition to the direct loss resulting from rejection of a load of avocados in California and reshipment to other markets, there is risk of upsetting appellants' normal sales in these markets by the unscheduled arrival of the rejected avocados, in a condition of ripeness compelling immediate sale for any price obtainable. [Depositions, p. 181.].

6. The extensive research work of the witness Dr. Roy W. Harkness on the subject of maturity of the varieties of avocados grown in Florida demonstrates that California's 8% oil requirement is not a scientifically

valid standard for maturity of these avocados. [Depositions, pp. 93-106.]

7. Although appellees were permitted to plead as an additional defense that the quality and maturity standards promulgated under Marketing Order No. 69 fail to comply with the Marketing Agreement Act, likewise the methods and procedures used in the administration thereof, the deposition of R. M. Wimbish taken by appellees shows that the avocado standards established by the Secretary of Agriculture are enforced by competent and independent inspection of all avocados handled at appellants' packing plants and at the plants of other handlers of Florida avocados. [Vol. II of Record.]

Substantial Nature of Question Presented

The jurisdictional question presented by this appeal, it is submitted, is of substantial importance in its bearing upon the functioning of the federal courts. The question is magnified in importance when it relates to exercise by a federal court of jurisdiction in a case wherein it is claimed that a state statute operates as a restriction upon the free flow of commerce among the states. To the august court that decided *Minnesota v. Barber*, 136 U. S. 313, *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511, *Best & Co. v. Maxwell*, 311 U. S. 454, and *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U. S. 525,* it need not be stressed that a principal objective of the Constitution of the United States is to protect interstate commerce from state re-

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*Also, *United States v. Rock Royal Cooperative, Inc.*, 307 U. S. 533; *McLeod v. Wisconsin*, 228 U. S. 115; *Cleveland Butter Co. v. Patterson*, 315 U. S. 148; *Rice v. Santa Fe Elevator Corporation*, 331 U. S. 218; *Amalgamated Assn. of Street, Electric Railway & Motor Coach Employees of America, Division 998, et al. v. Wisconsin Employment Relations Board*, 340 U. S. 383, 388-390; *Castle v. Hayes Freight Lines*, 348 U. S. 61.

striction, no matter by what device, and that a principal function of the federal courts is to ban such restriction. So zealous is this national policy that when it is claimed that a state statute, by its practical operation, interferes with an enactment by Congress to promote and regulate interstate commerce, the federal courts are vested with jurisdiction of such claims without allegation or proof of the amount or value involved.

It is a flaunting of the national will as expressed in the Judicial Code for a federal court to decline exercise of jurisdiction in a case in which a judicial remedy is sought of the kind provided for by sections 1331 and 1337. To say that the "past events" leading to the institution of this action do not present a justiciable controversy, a case for a declaration of rights and injunctive relief if needed, and to remit appellants to a vacuous administrative proceeding in the state courts of California in a case involving no administrative issue, is a palpable evasion of duty by a federal court. (Discussion of federal court jurisdiction in the opinions in *Alabama Public Service Commission v. Southern Ry. Co.*, 341 U. S. 341.)

By thorough practical demonstration, appellants have established that enforcement against them of section 792 of the Agricultural Code of California is in various respects a continuing and substantial commercial detriment; that it restricts their access to the prime market for avocados in the United States, a market in which there is large demand for their fruit; that it thwarts the purpose and plan of Congress, by the Agricultural Marketing Agreement Act, to promote orderly marketing of Florida avocados, in the interest of the general national economy; that the state officers of California have by their past acts evidenced a persistent intention to continue

to enforce the challenged statute so long as it remains in force and avow such intention in their pleadings in this case. For the direct and indirect loss to appellants by the 8% oil blockade maintained in California against most Florida avocados there is no possible recovery of damages. The detriment is real, substantial, immediate and continuous, and increases in extent as the avocado trees planted in Florida in recent years come into fruition.

Respectfully submitted,

ISAAC E. FERGUSON,
Attorney for Appellants.

APPENDIX I

Opinion of District Court

In the United States District Court for the Northern District of California, Northern Division.

Florida Lime and Avocado Growers, Inc., a Florida corporation, and South Florida Growers Association, Inc., a Florida corporation, Plaintiffs, vs. W. C. Jacobsen, Director of the Department of Agriculture of the State of California, Goodwin J. Knight, Governor of the State of California, and Edmund G. Brown, Attorney General of the State of California, Defendants. Civil No. 7648.

MEMORANDUM AND ORDER

This being an appropriate case, it has been heard by a three-judge district court pursuant to the provisions of Title 28 U. S. C. A. §§2281 and 2284.

Plaintiffs are Florida growers and packers of avocados and, concededly, are engaged in the interstate marketing of their product. They complain of the barrier which certain portions of the California Agricultural Code assertedly presents to the importation of their product into the State of California.

Division 5 ("Standardization"), Chapter 2 ("Fruit, Nut and Vegetable Standards"), of the California Agricultural Code, sets out a comprehensive system of packing, marketing and quality control of agricultural products including, *inter alia*, avocados. Plaintiffs first encounter this control as their fruit enters California, inspection being had at the familiar argicultural inspection stations located at the border wherever a highway enters the State (§782.6).[1] There the load is sampled (§782), and if

[1]All references in this opinion to sections are to sections of the Agricultural Code of the State of California unless otherwise specifically noted.

the fruit fails to meet the standards imposed by any pertinent section of the Agricultural Code (§785), the load is tagged as nonconforming fruit. Such noncomplying fruit is declared a nuisance and, if not reconditioned, is subject to seizure and eventual abatement as a nuisance (§785).

Reconditioning would involve, here, the substitution of qualified fruit for that found lacking, when weighed against the standards fixed by Chapter 2. The specific standard of which plaintiffs complain is that found in §792, which requires that all avocados contain not less than 8% oil by weight, excluding the skin and seed.

Plaintiffs allege that the variety of avocado grown by them in Florida differs from those grown in California in that they inherently possess a lesser percentage of oil by weight than those cultivated in California; that the varieties which they would introduce into California seldom meet the oil test of §792 at the time when they are in prime marketing condition.

It is further alleged that plaintiffs have shipped loads of avocados into California, several of which were found not to conform to the standard imposed by §792, and that those nonconforming loads were not reconditioned by substitution, but were removed from the state and marketed elsewhere (§785).

On the above stated facts, plaintiffs ask this court for certain declaratory and injunctive relief. Such relief cannot be granted as this court lacks jurisdiction of the cause.

The basic rule is that this court is a court of limited jurisdiction, and has no authority beyond that specifically granted it by law. The jurisdiction of this court is never presumed. The presumption is to the contrary (Lehigh Mining & Manufacturing Co. v. Kelly, 160 U. S. 327; United States v. Green, 107 F. 2d 19; and Durkey v.

Arndt, 46 F. Supp. 256). The first principle of federal jurisdiction is that it is the duty of litigants to make clear to the court the basis of its jurisdiction over the proceeding. Likewise, it is the duty of the court to make sure that jurisdiction exists. If federal jurisdiction is not apparent, the court not only will, but must, refuse to proceed with the determination of the merits of the controversy, unless this failure can be cured. This is true regardless of what stage the case may be in, and whether the defect is called to the court's attention by suggestion of the parties, or otherwise (Mansfield, C. & L. M. Railway Co. v. Swan, 111 U. S. 379; Warner v. Territory of Hawaii, 206 F. 2d 851; Koike v. Atchison, T. & S. F. Ry. Co., 157 Fed. 623; Skelly v. Dockweiler, 75 F. Supp. 11; and American Distilling Co. v. City of Sausalito, 73 F. Supp. 520).

The jurisdiction of a federal district court finds its initial limitation in the ultimate source of the court's authority, namely, the Constitution of the United States. A matter, to be justiciable, must be capable of categorization as either a "case" or a "controversy" (United States Constitution, Art. 3). While a wide variety of forms of action and remedies are permissible, the complaint—as a constitutional prerequisite to the assumption of jurisdiction by a federal court—must show that the case presents for determination *an existing dispute as to present legal rights.* When this is not affirmatively shown, the case must be disposed of as provided by the Federal Rules of Civil Procedure, §12(h)(2), where it is decreed that, ". . . Whenever it appears . . . that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

There is no claim here of any present existing controversy between the parties. The claim at best suggests no more than a threatened controversy. An actual con-

troversy could arise only if there were a co-existence of four facts, namely:

1. The bringing of avocados to California by plaintiffs;

2. The failure of avocados to meet the standards fixed by law;

3. The refusal of the plaintiffs to recondition or remove the avocados; and

4. An election by plaintiffs to contest the abatement in the State courts as provided by §7[illegible].

This lack of a present, actual, existing controversy concludes the jurisdiction of this court (Muskrat v. United States, 219 U. S. 346). The past events on which this case is predicated are not of sufficient legal [illegible] as to here and now create justiciable issues (Aetna Life Insurance Co. v. Haworth, 300 U. S. 227). The record now before this court shows no more than a mere prospect of interference posed by the bare existence of the law in question (United Public Workers v. Mitchell, 330 U. S. 75; and Wycoff Co., Inc. v. Public Service Comm'n. of Utah, 344 U. S. 237; e.f.: Ramspeck v. Federal Trial Examiners, 345 U. S. 128). On the record now before it, this court has no authority to take jurisdiction of this case, and is left with no course other than to dismiss the action at this time.

Defendants have filed motions to dismiss this action on a variety of grounds, all of them being premised on various subsections of Federal Rules of Civil Procedure, §12. Since this case must be dismissed because of a lack

of jurisdiction, it is unnecessary to consider defendants' motions to dismiss.

IT IS, THEREFORE, ORDERED that plaintiffs' complaint and the cause of action sought to be set forth in said complaint be, and the same is, hereby dismissed.

Dated: December 17th, 1958.

ALBERT LEE STEPHENS
Chief Judge, United States Court of Appeals for the Ninth Circuit.

LOUIS E. GOODMAN
Chief Judge, United States District Court for the Northern District of California.

SHERRILL HALBERT
United States District Judge.

APPENDIX II

Agricultural Code of California, Division V. Standardization*

Section 784. Preparation, etc., of nonconforming fruits, nuts or vegetables. It is unlawful to prepare, pack, place, deliver for shipment, deliver for sale, load, ship, transport, cause to be transported or sell any fruits, nuts or vegetables in bulk or in any container or subcontainer unless such fruits, nuts and vegetables, and their containers, conform to the provisions of this chapter.

Section 785. Abatement of noncomplying fruits, nuts and vegetables.

(Public nuisance: Holding.) Any lot of fruits, nuts or vegetables, including the containers thereof, which is not in compliance in all respects with the provisions of this chapter and rules and regulations issued hereunder, is hereby declared to be a public nuisance. Any enforcing officer, if he has reason to believe that any such lot is not in compliance as aforesaid, may hold such lot pending proceedings to condemn and abate such nuisance, as herein provided.

(Warning tag: Detachment, alteration, etc., unlawful.) The officer may affix to any lot so held a tag or notice warning that the lot is held and stating the reasons therefor. It is unlawful for any person other than an authorized enforcing officer to detach, alter, deface or destroy any such tag or notice affixed to any such lot, or to remove or dispose of such lot in any manner or under conditions other than as prescribed in such tag or notice, except upon written permission of an authorized enforcing officer or by order of court.

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*Deering's Agricultural Code of the State of California, 1953, with supplement covering legislation through 1957 session.

(Notice: Contents.) The officer by whom any such lot is held shall cause notice of noncompliance to be served upon the person in possession of said lot. The notice of noncompliance shall include a description of the lot, the place where and the reasons for which it is held, and shall give notice that said lot is a public nuisance and subject to disposal as provided in this section, unless within a specified time said lot shall have been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance.

(Duty to notify owner.) If the person so served is not the sole owner of the lot, or does not have authority as agent for the owner to bring said lot into compliance, it shall be the duty of such person in writing to notify the officer by whom such lot is held of the names and addresses of the owner or owners and all other persons known to him to claim an interest in said lot. Any person so served shall be liable for any loss sustained by such owner or other person whose name and address he has knowingly concealed from such officer.

If the lot has not been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance within the time specified in the notice, then the enforcing officer shall cause a copy of said notice to be served upon all persons designated in writing by the person in possession of said lot to be the owner or to claim an interest therein. Any notice required by this section may be served personally or by mail addressed to the person to be served at his last known address.

(Abatement with consent.) The enforcing officer, with the written consent of all such persons so served, is hereby authorized to destroy such lot or otherwise to abate the nuisance. If any such person fails or refuses to give such

consent, then the enforcing officer shall proceed as provided hereinafter.

(Petition for abatement.) If the lot so held is perishable or subject to rapid deterioration, the enforcing officer may file a verified petition in any superior or inferior court of the State to destroy such lot or otherwise abate the nuisance. The petition shall show the condition of the lot, that the lot is situated within the county, that the lot is held, and that notice of noncompliance has been served as herein provided. The court may thereupon order that such lot be forthwith destroyed or the nuisance otherwise abated as set forth in said order.

(Non-perishable lot: Report: Petition: Answer: Determination.) If the lot so held is not perishable nor subject to rapid deterioration, the enforcing officer shall immediately report the condition of said lot to the director. Within five (5) days from the receipt of a report, the director may file a petition in the superior court in the county where the lot is situated for an order to show cause, returnable in five (5) days, why the lot should not be abated. The owner or person in possession on his own motion within five (5) days from the expiration of the time specified in the notice of noncompliance may file a petition in said court for an order to show cause, returnable in five (5) days, why said lot should not be released to petitioner and any warning tags previously affixed removed therefrom. Final determination by said court in either case shall be within a period of not to exceed twenty (20) days from the date said petition was filed.

(Judgment: Sale: Costs deducted.) The court may enter judgment ordering that said lot be condemned and destroyed in the manner directed by the court or relabeled, or denatured or otherwise processed, or sold or released upon such conditions as the court in its discretion may impose to insure that the nuisance will be abated. In the event of sale by order of court, the costs of storage, handling and reconditioning or disposal shall be deducted from the proceeds of sale and the balance, if any, paid into court for the owner. (Amended by Stats. 1953, ch. 600, §2, ch. 752, §1; Stats. 1955, ch. 431, §1.)

Section 785.6. *Civil liability of violator: Added penalty: Amount: Value of noncomplying fruits, etc., defined: Disposition of money recovered.* Any person who violates any provision of this chapter shall, in addition to any penalty otherwise provided, be liable civilly, in an action brought by the director, for a penalty in an amount equal to the value which the fruits, nuts, or vegetables involved in the violation would have if they conformed to the requirements of this chapter. The value of such noncomplying fruits, nuts and vegetables shall be the current market value of lowest priced grade of a marketable commodity of like kind and nature at the time and place of the violation. Any money recovered under this section shall be paid into the Department of Agriculture fund.

Section 790. Fruit, nut and vegetable standards: Establishment. There are hereby established standards for fruits, nuts and vegetables which shall include apricots, avocados, berries, cherries, citrus fruits, dates, grapes, nectarines, peaches, pears, oriental persimmons, plums, and

fresh prunes, "wonderful" pomegranates, quinces, walnuts, artichokes, asparagus, Brussels sprouts, cantaloupes, carrots, cauliflower, celery, green corn, head lettuce, Italian sprouting broccoli, melons, onions, peas, potatoes, sweet potatoes, tomatoes and apples.

Section 792. Avocados.

(Freedom from defects: Tolerance.) Avocados shall be free from all defects, including but not restricted to those hereinafter mentioned, which singly or in the aggregate cause a waste of 10 per cent or more, by weight, of the entire avocado, including the skin and seed. Not more than 5 per cent, by count, of the avocados in any one container or bulk lot may be below the foregoing requirement.

(Definition.) "Defect" includes damage due to insect injuries, freezing injury, decay, rancidity, or other causes.

(Oil content.) All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 per cent of oil, by weight of the avocado excluding the skin and seed.

Section 831. Violation of chapter: Misdemeanor: Punishment. The violation of any of the provisions of this chapter is a misdemeanor and punishable by a fine of not less than fifty dollars nor more than five hundred dollars or by imprisonment in the county jail for not more than six months, or by both.

APPENDIX III

Agricultural Marketing Agreement Act of 1937*

7 U.S.C.A. Sec. 601. Declaration of conditions.

It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce. May 12, 1933, c. 25, Title I, §1, 48 Stat. 31; June 3, 1937, c. 296, §§1, 2(a), 50 Stat. 246."

7 U.S.C.A. Sec. 602. Declaration of policy; establishment of base periods for prices; marketing standards

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301 (a) (1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current

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*The Agricultural Marketing Agreement of June 3, 1937 (7 U.S.C.A. sections 671-674) affirmed the validity of operative sections of the Agricultural Adjustment Act of May 12, 1933. (Historical note, 7 U.S.C.A. page 337.)

consumptive demand in domestic and foreign markets, and (b) authorizing no action under sections 401-408, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, to establish and maintain such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c(2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest. May 12, 1933, c. 25, Title I, §2, 48 Stat. 32; Aug. 24, 1935, c. 641, §§1, 2, 49 Stat. 750, 782; June 3, 1937, c. 296, §§1, 2(b), 50 Stat. 246, 247; Aug. 1, 1947, c. 425, §1, 61 Stat. 707; July 3, 1948, c. 827, Title III, §302(a), 62 Stat. 1257.

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-608, 608a, 608b, 608c, 608d, 608e-1, 608f, 612, 613, 614-619, 620, 623, and 624 of this title, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices. As amended Aug. 28, 1954, c. 1041, Title IV, §401(a), 68 Stat. [illegible].

7 U.S.C.A. Sec. 608. Powers of Secretary—Investigations; proclamation of findings

(1) Whenever the Secretary of Agriculture has reason to believe that:

(a) The current average farm price for any basic agricultural commodity is less than the fair exchange value thereof, or the average farm price of such commodity is likely to be less than the fair exchange value thereof for the period in which the production of such commodity during the current or next succeeding marketing year is normally marketed, and

(b) The conditions of and factors relating to the production, marketing, and consumption of such commodity are such that the exercise of any one or more of the powers conferred upon the Secretary under subsections (2) and (3) of this section would tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624 of this title, he shall cause an immediate investigation to be made to determine such facts. If, upon the basis of such investigation, the Secretary finds the existence of such fact, he shall proclaim such determination and shall exercise such one or more of the powers conferred upon him under subsections (2) and (3) of this section as he finds, upon the basis of an investigation, administratively practicable and best calculated to effectuate the declared policy of said sections.

* * * * * * * * *

7 U.S.C.A. Sec. 608b. Marketing agreements; exemption from antitrust laws

In order to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, the Secretary of Agriculture

shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: *Provided*, That no such agreement shall remain in force after the termination of said section. May 12, 1933, c. 25, Title I, §8(2), 48 Stat. 34; Apr. 7, 1934, c. 103, §7, 48 Stat. 528; renumbered §8b and amended Aug. 24, 1935, c. 641, §4, 49 Stat. 753; June 3, 1937, c. 296, §1, 50 Stat. 246; June 30, 1947, c. 169, Title II, §206(d), 61 Stat. 208.

7 U.S.C.A. 608c. Order regulating handling of commodity—issuance by Secretary

(1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in sections 601-608, 608a, 608b, 608c, 608d, 612, 613, 614-619, 620, 623 and 624 of this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

Commodities to which applicable

(2) Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof (except canned or frozen grapefruit, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including filberts, almonds, pecans and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, and Idaho, and not including fruits, other than olives and grapefruit, for canning or freezing), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing), soybeans, hops, honeybees and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin). * * *

Notice and hearing

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

Finding and issuance of order

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions

thereof will tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title with respect to such commodity.

Milk and its products; terms and conditions of orders

(5) This part of section 608c relates to orders governing milk and its products.

Other commodities; terms and conditions of orders

(6) In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

* * * * * * * *

(F) Requiring or providing for the requirement of inspection of any such commodity produced during specified periods and marketed by handlers.

* * * * * * * *

(H) Providing a method for fixing the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging, transportation, sale, shipment, or handling of any fresh or dried fruits, vegetables, or tree nuts: *Provided, however*, That no action taken hereunder shall conflict with the Standard Containers Act of 1916 and the Standard Containers Act of 1928;

(I) Establishing or providing for the establishment of marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order.

* * * * * * * *

Further provisions of section 608c govern the procedure for adoption of marketing agreements, also the administration and enforcement of orders made by the Secretary of Agriculture in carrying out such agreements.

FILE COPY

MOTION TO
DISMISS OR
AFFIRM

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. [redacted]

LIME AND AVOCADO GROWERS, INC., Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida cor-

Appellants,

v.

[illegible] VOORSEN, Director of the Department of [illegible] of the State of California, GOODWIN KNIGHT, Governor of the State of California, EDMUND G. BROWN, Attorney General of the State of California,

Appellees.

On Appeal from the United States District Court for the Northern District of California, Northern Division

MOTION TO DISMISS OR AFFIRM

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MISCELLANEOUS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 820

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation,

Appellants,

vs.

W. A. JACOBSEN, Director of the Department of Agriculture of the State of California, GOODWIN J. KNIGHT, Governor of the State of California, and EDMUND G. BROWN, Attorney General of the State of California,

Appellees.

On Appeal from the United States District Court for the Northern District of California, Northern Division

MOTION TO DISMISS OR AFFIRM

OPINION BELOW

The opinion of the three-judge district court dismissing the case for lack of jurisdiction is reported at 169 F. Supp. 774

MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the appeal be dismissed because it is not within the jurisdiction of this court. Appellees move, in the alter-

native, to affirm on the ground that the question presented is so unsubstantial as not to need further argument.

QUESTIONS PRESENTED

Whether this court has jurisdiction of the case under 28 U. S. C. § 1253.

Whether there exists a case or controversy under Article III, United States Constitution, cognizable in the United States District Court.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the California Agricultural Code, and of the California Administrative Code, are set forth in the Appendix A to appellees' motion.

STATEMENT

A district court of three judges, convened pursuant to 28 U. S. C. §§ 2281 and 2284, dismissed appellants' complaint by order entered December 17, 1958, for lack of a presently existing controversy between the parties. Appellants on February 12, 1959, filed a direct appeal from the formal judgment of dismissal entered by a single district judge on January 13, 1959.

Appellants are Florida corporations engaged in the business of marketing avocados and other agricultural products grown in Florida (Complaint, Par. I; deposition of Kendall, Tr. 159; deposition of Pixwaty, Tr. 249). In this action appellants seek a declaratory judgment and an injunction restraining the enforcement of § 792 of the California Agricultural

Code. Named as defendants are the Governor, Attorney General, and the Director of Agriculture of the State of California. Appellants have not moved for a temporary restraining order or for a preliminary injunction, nor did appellants seek leave to amend their complaint or file a petition for rehearing following the dismissal.

Section 792 of the California Agricultural Code is part of a comprehensive statutory program establishing quality and maturity standards for a large number of agricultural products (see California Agric. Code, Div. 5, "Standardization," §§ 751-11499, 3 Calif. Adm. Code §§ 1397.5-1397.60). Section 792 prescribed standards for avocados. This section provides, in relevant part: "All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 percent of oil, by weight of the avocado excluding the skin and seed." This 8 percent oil content standard for avocados was enacted into law by the California Legislature in 1925, Ch. 350, Calif. Stats. 1925.

In their complaint appellants contend that as applied to Florida avocados marketed in California, the 8 percent oil content requirement violates the Commerce Clause and the Equal Protection Clause of the Constitution, and, further that it conflicts with the Agricultural Marketing Agreement Act of 1937 (Act of August 24, 1935, 49 Stat. 750, as amended by Act of June 3, 1937, 50 Stat. 246; 7 U. S. C. §§ 601-659) and a marketing order regulating avocados grown in South Florida, promulgated thereunder by the Secre-

tary of Agriculture (Complaint, Pars. XXVIII, XXIX and XXX; 7 C. F. R. 969).

After appellees answered the complaint, appellants by written stipulation were given permission to take depositions in Florida of their own witnesses.[1] Two of the principal depositions were those of Harold E. Kendall, President of appellant South Florida Growers Association, Inc., and Fred A. Piowaty, Assistant General Manager of appellant Florida Lime and Avocado Growers, Inc. These officers of appellant corporations submitted evidence of the business operations of appellants and the effects that California's 8 percent oil content standard had on appellants' businesses.[2]

The allegations of appellants in the complaint and the depositions of their officers reflect the following pattern of business: Between them appellants market approximately 50 percent of all avocados grown in Florida (Complaint, Par. XIV). Appellant Florida Lime and Avocado Growers, Inc., began marketing avocados in 1937 and appellant South Florida Growers Association, Inc., in 1939. Both began marketing Florida avocados in California in 1954. Since that time, avocado sales in California have represented 13.53 percent of the total avocado sales of appellant Florida Lime and Avocado Growers, Inc., and 5 percent of the total avocado sales of South

[1] The written stipulation to take depositions, signed by counsel for [illegible] dated January 9, 1958, being a part of the record on appeal, provided that the depositions were being taken for appellants' sole benefit [illegible] offered by appellants in evidence, and were not being taken for purposes of discovery.

[2] The depositions of Mr. Kendall and Mr. Piowaty are part of the record on appeal.

Florida Growers Association, Inc. Approximately 94 percent to 98 percent of the avocados shipped by appellants to California were found upon inspection to comply with § 792 of the Agricultural Code, the statute under attack. For example, appellant Florida Lime and Avocado Growers, Inc., claims that during the marketing seasons 1954-55, 1955-56, 1956-57, and 1957-58, the California authorities rejected 6,681 lug boxes of avocados—5.47 percent of the total shipped to California by this appellant (Appellants' Exhibit 21; Appellees' Exhibit S); Appellant South Florida Growers Association, Inc., claims that during the same period the California authorities rejected 641 bushels—only 1.84 percent of the avocados which it shipped to California (Appellants' Exhibits 17 and 19). No claim is made that any of the appellants' avocados were seized by California authorities, only that warning notices of noncompliance were issued (Appellants' Exhibit 22).

The few lots which failed to meet the California statutory requirements[2] were not lost to appellants, but were reshipped and sold on neighboring markets outside California. Owners of noncomplying avocados are permitted to dispose of them elsewhere without violating California law. 3 Calif. Adm. Code § 1256.2. The damages claimed by appellants from the operation of the California statute under attack are the

[2] Appellant Florida Lime and Avocado Growers, Inc., could cite only five lots of the entire four eight years which were rejected upon inspection by California authorities (Appellants' Exhibit 21, Deposition of Powell, p. [illegible]). Appellant South Florida Growers Association, Inc., claims seven lots were rejected (Appellants' Exhibit 17, Deposition of Kincaid, page 158).

reductions in anticipated revenues resulting from the reshipment and sale of the noncomplying avocados on markets in neighboring states. In the case of neither appellant was the claimed reduction in anticipated revenue significant in relation to its volume of business.[1]

In addition to transshipping to markets outside California, appellants have other alternative courses of action open to them upon receiving notice that a lot of avocados does not comply with the California statute. One is to recondition the lot by removing the noncomplying avocados from the lot. Calif. Agric. Code § 785. Another is to file a petition with the California superior court praying for an order authorizing the marketing of the avocados. Calif. Agric. Code § 785. Lastly, the appellants could decline to either recondition or transship, thus inviting the California authorities to file a petition in a state superior court requesting an order abating the avocados as a nuisance. See Calif. Agric. Code § 785. In such a proceeding, of course, appellants could raise as a defense the invalidity of the statute. They could also attack the statute by way of defense if a state court actions were brought to impose civil or criminal penalties for violation of the statute. See Calif. Agric. Code §§ 784, 785.6, 831.

Appellees filed motions to dismiss the action as to both appellants, accepting as true for the purpose of

[1] For a detailed analysis of the claimed losses of both appellants, see Points and Authorities in Support of Appellees' Motions to Dismiss, which is part of the record on appeal.

the motions the allegations of appellants' complaint and the evidence presented by their corporate officers.[5] The first ground for appellants' motions to dismiss was that appellants did not meet the "strict test" (*American Federation of Labor* v. *Watson*, 327 U. S. 582, 593) of great and immediate irreparable harm which a litigant must meet before a federal court will exercise its powers of equity to enjoin state officials from enforcing state laws, e.g., *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89, 95; *Douglas* v. *Jeannette*, 319 U. S. 157, 164. Other grounds for appellants' motions to dismiss were that the complaint fails to show that the matter in controversy exceeds the sum or value of $3,000 within the purview of 28 U. S. C. § 1331 and that the complaint fails to show that the action or proceeding arises under any act of Congress regulating commerce within the purview of 28 U. S. C. § 1337. Alternatively, appellees moved the court to hold the case in abeyance pending an authoritative interpretation of California law by California courts. See, e.g., *American Federation of Labor* v. *Watson*, 327 U. S. 582.

The district court dismissed the complaint on the ground that it had no jurisdiction because of the absence of a presently existing controversy between

[5] Appellants complain in their Jurisdictional Statement that to the extent that the decision of the district court is of a factual nature, it is somehow incorrect. It is, however, elemental that a motion to dismiss, like a motion for summary judgment under Rule 56, Federal Rules of Civil Procedure, may be based on pleadings, depositions and affidavits if there is no material controversy as to controlling facts. (See, U. S., *Spielman Motor Company* v. *Dodge*, 295 U. S. 89; *Ex parte La Prade*, 289 U. S. 444, 452.) Significantly, appellants cite no specific factual basis of the decision below which they claim to be erroneous. (Jurisdictional Statement, p. 7.)

the parties. *Florida Lime and Avocado Growers v. Jacobsen*, 169 F. Supp. 774. The court's conclusion is summed up as follows:

> "There is no claim here at any present existing controversy between the parties. The claim at best suggests no more than a threatened controversy. An actual controversy could arise only if there were a co-existence of four facts, namely:
>
> "1. The bringing of avocados to California by plaintiff;
>
> "2. The failure of avocados to meet the standards fixed by law;
>
> "3. The refusal of the plaintiff to recondition or remove the avocados; and
>
> "4. An election by plaintiffs to contest the abatement in the state courts as provided by Section 785 [of the California Agricultural Code]. 169 F. Supp. at 776."

If this court were to find that a justiciable controversy exists, the other jurisdictional questions raised by appellee's motions to dismiss, but not considered by the district court, would remain. One such question whether the case should be dismissed because appellants are suffering no irreparable injury is a matter of equity and would involve the exercise of discretion by the district court. *American Federation of Labor* v. *Watson*, 327 U. S. at 593; *Penn* v. *Williams*, 294 U. S. 176, 185.

ARGUMENT

I. The Motion to Dismiss Should Be Granted Because the Appeal Is Not Within the Jurisdiction of This Court.

The Judicial Code provides that only a district court of three judges may grant an injunction restraining the enforcement of a state statute "upon the ground of the unconstitutionality of such statute." 28 U. S. C. § 2281. The three-judge district court below was erroneously convened because appellants prayed for an injunction restraining the enforcement of the California statute in question on a ground other than its unconstitutionality. In addition to complaining that the statute is repugnant to the Commerce Clause and the Equal Protection Clause of the Constitution (Complaint, Pars. III, XXIX, XXX), appellants asserted a conflict between the state statute and a federal statute, the Agricultural Marketing Agreement Act of 1937, Act of August 24, 1935, 49 Stat. 750, as amended, Act of June 3, 1937, 50 Stat. 246; 7 U. S. C. §§ 601-659 (Complaint, Pars. IV and XXX). See *Parker* v. *Brown*, 317 U. S. 341. This court has held that if one of the grounds for an injunction against the enforcement of a state statute is its asserted conflict with a federal statute, the case is not a proper one for decision by a three-judge district court. *Lemke* v. *Farmers' Grain Co.*, 258 U. S. 50; cf. *Ex parte Buder*, 271 U. S. 461.

Since the suit is not one that is required to be heard by a three-judge court, a direct appeal to this court may not be taken under 28 U. S. C. § 1253. *Stainback*

v. *Mo Hock Ke Lok Po*, 336 U. S. 368; *Phillips* v. *United States*, 312 U. S. 246; *Oklahoma Gas & E. Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386; *Gully* v. *Interstate Natural Gas Co.*, 292 U. S. 16. If a three-judge court is erroneously convened and enters a final order, the appeal must be taken to the appropriate court of appeals. *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. at 380-381; *Phillips* v. *United States*, 312 U. S. at 254; *Oklahoma Gas & E. Co.* v. *Oklahoma Packing Co.*, 292 U. S. at 393; *Lemke* v. *Farmers' Grain Co.*, 258 U. S. 50. The appeal must, therefore, be dismissed.[1]

II. The Judgment of the District Court Should Be Affirmed Because the Questions Are So Unsubstantial as Not to Need Further Argument.

The decision of the district court is plainly correct. There is no justiciable "controversy" under Article III of the Constitution unless the plaintiff's suit against public officers shows a threatened invasion of his substantive legally protected rights. *Pacific Likens Steel Co.*, 310 U. S. 113, 125. As Mr. Chief Justice Hughes said in *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240-241:

> "The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. * * * It must be a real and substantial controversy admitting of specific re-

[1] Unlike *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368, [illegible] appeal, which lies to the Court of Appeals for the Ninth Circuit, [illegible] Section 28 U. S. C. [illegible] There is no statutory authorization for review of a district court [illegible]

lief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."

Appellants' case is too contingent and speculative to meet this test of justiciability. Appellants are in much the same position as the federal employees in *United Public Workers* v. *Mitchell*, 330 U. S. 75, who sued to enjoin the Civil Service Commission from enforcing the Hatch Act and for a declaratory judgment holding the act unconstitutional. The federal employees involved, except one Poole, declared their desire to engage in political activity proscribed by the act, but had not actually done so. The court held that no case or controversy existed because the absence of actual violations rendered the threat of dismissal or discipline to be hypothetical, not actual.

Similarly, appellant corporations merely declare their desire to market avocados in California which may not comply with California law. They have not actually done so. They have in the past successfully sold a very high percentage of their avocados in California markets and have reshipped the few lots that did not meet the California standard to neighboring western markets. No threatened interference with appellants' rights appears beyond that implied by the existence of the statute. A general threat that officers will enforce the laws they are charged to administer is not sufficient to create a justiciable controversy. *United Public Workers* v. *Mitchell*, 330 U. S. at 88.

The position of appellant corporations is in sharp contrast with the position of the plaintiff in *Doud* v. *Hodge*, 350 U. S. 485, a case relied on by appellants in their Jurisdictional Statement. In *Doud* v. *Hodge* the plaintiffs' business consisted exclusively of selling and issuing money orders in the State of Illinois, through such agents as retail drug, hardware and grocery stores. The entire business was regulated by the statute in question, and plaintiffs could not conduct their business operation without violating the statute. This court reversed the district court which was clearly in error in deciding that it had no jurisdiction because the state courts had not rendered a definitive decision as to the meaning and federal constitutionality of the state statute.

By contrast with the plaintiffs in *Doud* v. *Hodge* appellants can—indeed, always have—operated their entire business without violating the California statute they seek to have declared unconstitutional. The picture presented, even when stated favorably to appellants, is as follows: In one of their markets—California—appellants have marketed a substantial volume of one of their products—avocados—but hesitate to increase that volume with fruit that does not meet the 8 percent oil test. That appellants' case looks to possible future controversy and not to presently existing facts is suggested by the detriment they anticipate as "avocado trees planted in Florida in recent years come into fruition" (Jurisdictional Statement, p. 15). Neither appellant, nor any other Florida handler, has made any commercial shipments of Florida avocados

to California for the past year (Affidavit of Whipple, Exhibit A to Appellees' Opposition to Appellants' Motion to Amend Complaint).

Appellants' case is equally distinguishable from *Evers* v. *Dwyer*, 358 U. S. 202, also relied on by appellants. The plaintiff in *Evers* v. *Dwyer*, a Negro, immediately violated the Memphis segregation ordinance at the moment he seated himself in the front portion of the public bus. At this point the justiciable controversy came into existence. The facts which would form the basis of the litigation were fixed and would never be more concrete. Regardless of how many times the plaintiff boarded a Memphis bus, his racial identity under the ordinance would be unchanged.

Appellant corporations, on the other hand, have not violated the California law. Moreover, there are no concrete facts to shape a justiciable dispute because appellants have reshipped to other markets the few lots of avocados which have failed to meet the 8 percent oil standard. Appellants seek to enjoin the enforcement of the California statute as to future shipments. But it is a matter of speculation whether the avocados in such future shipments will have insufficient oil content under the statute. Certainly appellants' past experience indicates a high probability that future shipments will be marketed freely in California (*supra* at p. 5). Only if appellants refuse to either tranship or to recondition a specific lot which fails to meet the statutory standard, thereby giving

rise to a specific dispute with the state or county agricultural inspectors, will the facts be as concrete as in *Evers* v. *Dwyer*.

Realistically, appellants are seeking to establish a defense against a cause of action which they fear the appellees may in the future assert against them in the California courts if appellants ever violate the California law, cf., *Public Service Comm'n.* v. *Wycoff*, 344 U. S. 237, 248. It is not the action of the appellee state officials, but the appellants' fears, which prevent their marketing of avocados in California. As said by Mr. Justice Brandeis in *Willing* v. *Chicago Auditorium*, 277 U. S. 274, 289-290, "The fact that the plaintiff's desires are thwarted by its own doubts, or by the fears of others, does not confer a cause of action."

An affirmance will not have immediate importance beyond the particular facts and parties involved. The actual, practical effect of affirmance will be to require appellants to commence marketing avocados in California of less than 8 percent oil content, should they desire to test the California law. Should a county agricultural commissioner or a state inspector seize or otherwise interfere with such marketing, an actual controversy involving a fixed factual situation will exist, and appellants will have available to them ample legal remedies to test the validity of the statute.

CONCLUSION

The appeal should be dismissed, or alternatively, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX A

California Agricultural Code, Section 784:

"It is unlawful to prepare, pack, place, deliver for shipment, deliver for sale, load, ship, transport, cause to be transported or sell any fruits, nuts, or vegetables in bulk or in any container or subcontainer unless such fruits, nuts and vegetables, and their containers, conform to the provisions of this chapter."

California Agricultural Code, Section 785:

"Any lot of fruits, nuts or vegetables, including the containers thereof, which is not in compliance in all respects with the provisions of this chapter and rules and regulations issued hereunder, is hereby declared to be a public nuisance. Any enforcing officer, if he has reason to believe that any such lot is not in compliance as aforesaid, may hold such lot pending proceedings to condemn and abate such nuisance, as herein provided.

The officer may affix to any lot so held a tag or notice warning that the lot is held and stating the reasons therefor. It is unlawful for any person other than an authorized enforcing officer to detach, alter, deface or destroy any such tag or notice affixed to any such lot, or to remove or dispose of such lot in any manner or under conditions other than as prescribed in such tag or notice, except upon written permission of an authorized enforcing officer or by order of court.

The officer by whom any such lot is held shall cause notice of noncompliance to be served upon the person in possession of said lot. The notice of noncompliance shall include a description of the lot, the place where and the reasons for which it is held, and shall give notice that said lot is a public nuisance and subject

to disposal as provided in this section, unless within a specified time said lot shall have been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance.

If the person so served is not the sole owner of the lot, or does not have authority as agent for the owner to bring said lot into compliance, it shall be the duty of such person in writing to notify the officer by whom such lot is held of the names and addresses of the owner or owners and all other persons known to him to claim an interest in said lot. Any person so served shall be liable for any loss sustained by such owner or other person whose name and address he has knowingly concealed from such officer.

If the lot has not been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance within the time specified in the notice, then the enforcing officer shall cause a copy of said notice to be served upon all persons designated in writing by the person in possession of said lot to be the owner or to claim an interest therein. Any notice required by this section may be served personally or by mail addressed to the person to be served at his last known address.

The enforcing officer, with the written consent of all such persons so served, is hereby authorized to destroy such lot or otherwise to abate the nuisance. If any such person fails or refuses to give such consent, then the enforcing officer shall proceed as provided hereinafter.

If the lot so held is perishable or subject to rapid deterioration, the enforcing officer may file a verified petition in any superior or inferior court of the State to destroy such lot or otherwise abate the nuisance.

The petition shall show the condition of the lot, that the lot is situated within the county, that the lot is held, and that notice of noncompliance has been served as herein provided. The court may thereupon order that such lot be forthwith destroyed or the nuisance otherwise abated as set forth in said order.

If the lot so held is not perishable nor subject to rapid deterioration, the enforcing officer shall immediately report the condition of said lot to the director. Within five (5) days from the receipt of such report, the director may file a petition in the superior court in the county where the lot is situated for an order to show cause, returnable in five (5) days, why the lot should not be abated. The owner or person in possession on his own motion within five (5) days from the expiration of the time specified in the notice of noncompliance may file a petition in said court for an order to show cause, returnable in five (5) days, why said lot should not be released to petitioner and any warning tags previously affixed removed therefrom. Final determination by said court in either case shall be within a period of not to exceed twenty (20) days from the date said petition was filed.

The court may enter judgment ordering that said lot be condemned and destroyed in the manner directed by the court or relabeled, or denatured or otherwise processed, or sold or released upon such conditions as the court in its discretion may impose to insure that the nuisance will be abated. In the event of sale by order of court, the costs of storage, handling and reconditioning or disposal shall be deducted from the proceeds of sale and the balance, if any, paid into court for the owner."

California Agricultural Code, Section 785.6:

"Any person who violates any provision of this chapter shall, in addition to any penalty otherwise provided, be liable civilly, in an action brought by the director, for a penalty in an amount equal to the value which the fruits, nuts, or vegetables involved in the violation would have if they conformed to the requirements of this chapter. The value of such non-complying fruits, nuts and vegetables shall be the current market value of the lowest priced grade of a marketable commodity of like kind and nature at the time and place of the violation. Any money recovered under this section shall be paid into the Department of Agriculture Fund."

California Agricultural Code, Section 792:

"Avocados shall be free from all defects, including but not restricted to those hereinafter mentioned, which singly or in the aggregate cause a waste of 10 per cent or more by weight, of the entire avocado including the skin and seed: Not more than 5 per cent, by count, of the avocados in any one container or bulk lot may be below the foregoing requirement.

"'Defect' includes damage due to insect injury, freezing injury, decay, rancidity, or other causes.

"All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 per cent of oil, by weight of the avocado excluding the skin and seed."

California Agricultural Code, Section 831:

"The violation of any of the provisions of this chapter is a misdemeanor and punishable by a fine of not less than fifty dollars ($50) nor more than five

hundred dollars ($500), or by imprisonment in the county jail for not more than six months, or by both."

California Administrative Code, Title 3, Section 1366.2:

"*Disposition at Inspection Stations of Lots or Loads Which Fail to Comply.*

(a) Produce which fails to comply and which has originated in California may go to a location in California (not out-of-state) under proper written authorization of the enforcement officer, provided it goes to a specified person or firm at that location, and that legal disposition at destination is performed under the direction of an enforcement officer at destination.

(b) Produce which fails to comply, and which originated outside California, may go to an out-of-state location: (1) if the lot or load returns to an out-of-state destination, or (2) proceeds through California, without unloading, to an out-of-state destination; in these two instances reconditioning or remarking is not necessary. However, if such load or lot of produce is to proceed to a California destination, it may do so only under proper written authorization of the California enforcement officer, and provided the destination is a specified person or firm at a California location, and that legal disposition at destination is performed under the direction of an enforcement officer at said destination.

In the case of (2) above of this section, such load or lot may be transported through California only under proper written authorization of the California enforcement officer, and provided an enforcement officer at the border station at the exit location is notified.

(c) A rejected lot or load may be reconditioned or remarked, whichever is necessary to provide com-

pliance, at the station, provided this is accomplished within a reasonable time specified by the enforcement officer, and when reconditioned, the lot is again submitted for inspection."

California Administrative Code, Title 3, Section 1397.5:

"*Avocados, Determination of Oil Content.* The method of determining oil content in avocados shall be the method as described in the 'Official Method for the Determination of Oil in Avocados', issued by the Bureau of Chemistry of the State Department of Agriculture, and published in the 1st quarterly, 1955 Bulletin of the State of California, Department of Agriculture, Volume XLIV, Number 1."

California Administrative Code, Title 3, Section 1397.6:

"*Avocados, Sample for Maturity Test.* The number of containers to be selected from any lot of avocados for the purpose of making a maturity test shall be as follows:

Amount	*Sample Containers*
50 containers or less	2
51 to 100	3
101 to 200	4
201 to 300	5
301 to 400	6
401 to 500	7
501 to 800	9
800 and up	10

From each sample container select the least mature appearing avocado, provided the sample for testing shall be at least 5 fruits; if there are less than 5 containers as the number of containers required, more than 1 avocado will need to be selected from some of the containers.

From the sample fruits selected for testing, individually test the 3 least mature appearing avocados. When 2 of these 3 tests are 8 percent oil or better, and 1 of the tests shows less than 8 percent but not below 7.5 percent, 2 additional least mature appearing avocados from the sample shall be tested.

In order to allow for variations incident to the sampling and testing procedure, no lot shall be considered as failing to meet the maturity requirements when only 1 avocado of the sample tests less than 8 percent oil, provided said low-test fruit does not test below 7.5 percent oil, and the other fruits in the sample each show 8 percent oil or better. (Rev. 5-57)"

Reprinted From

THE BULLETIN
DEPARTMENT OF AGRICULTURE
STATE OF CALIFORNIA

VOL. XLIV JANUARY-FEBRUARY-MARCH, 1955 NUMBER 1

OFFICIAL METHOD FOR THE DETERMINATION OF OIL IN AVOCADOS

(Revised 1954)

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Section 792 of the Agricultural Code of the State of California provides, in part: "All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 percent of oil, by weight of the avocado excluding the skin and seed." The maturity of an avocado is of considerable importance: an avocado of insufficient maturity is likely to shrivel and rot while softening and will lack the desirable flavor found in more mature fruit. Appraising the maturity of an avocado by visual inspection is of some importance but even expert judgment fails in many instances. Factors considered in such inspection are general ground color, number and nature of surface spots, conditions of stem, and when cut the thickness and color of seed coat and condition of seed. Growing conditions in the orchard at time of picking are of some importance, too.

The primary standard method for measuring the oil in avocados is by ethyl ether extraction from the dried avocado pulp in a Soxhlet extractor. This method is time-consuming and involves direct weighing of the oil. In 1928 Lesley and Christie[1] described a shorter method, calibrated against results obtained by ether extraction, for more rapid determination of

the oil content of avocados. This method involves grinding the fresh avocado pulp with Halowax oil (technical monochloronaphthalene) and measuring the refractive index of the avocado oil and the Halowax oil mixture. The index thus obtained is given meaning by a parallel determination of oil content by actual ether extraction. By obtaining a series of such values and constructing a graph each small change in refractive index could be represented by the proper change in percent oil.

The work of Lesley and Christie[1] was brief and rather incomplete. In 1949 A. F. Shannon[2], after considerable work and research in collaboration with a Bureau of Chemistry Staff member, revised the oil content-refractive index chart published in *The Bulletin*[2] and this appears now as Table 1 in this publication. The method established for ether extraction is also described in the A. F. Shannon paper[2].

Apparatus and Solutions Required

Portable food chopper with nut butter cutter (fine) blade or Acme Safety Grater
Power grinder, type Figure (1) or type Figure (2) [illustrations omitted]
Grinding Shell with two steel balls
Spatula (small)
Knife, three-inch blade
Pipette, 5 ml. (all glass automatic type may also be used)
Filter paper (soft), drip coffee maker type
Halowax oil No. 1000, Fisher Scientific Company or equivalent
Ethyl ether
Tweezers

Abbe type refractometer and attachments (water circulated)
Lens light or suitable instrument light
Large watch glass or pie tin
Balance, sensitive to 10 milligrams, capacity 5 to 100 grams
Small electric heater or hot water bath

Halowax Oil. The index of refraction of different lots of Halowax oil may vary as much as 0.002 and may also change with age or exposure to light. The index of refraction of each lot used should be obtained and corrected to 25 degrees C., as described below under "Calculation—Halowax Oil Correction."

Power Grinders. The later type grinder shown in Figure 1 [illustration omitted] has faster action than grinders formerly used and an operating time of 10 minutes has been found sufficient for the hardest fruits encountered. If the type in Figure 2 [illustration omitted] is used, 15 minutes operation is recommended.

Grinding Shells. Shell material of monel is preferred; steel balls should be well seated at the ends of cylinder. The cylinder seals must be protected from damage and reground when necessary to form an excellent seal. The steel balls should be one-eighth inch less in diameter than the shell cylinder. Complete specifications for construction of grinding shell may be obtained from California Department of Agriculture.

Preparation of Sample

Sample Preparation Using Portable Food Chopper. Dice to about one-half inch cubes the entire fruit excluding the skin, seed and seed coat. This may be facilitated by first quartering the fruit lengthwise. After thoroughly mixing the cubes, transfer all or a portion (size of fruit determining) of the mass slowly through a clean and dry food chopper. Careful operation will prevent juices from being lost. Collect the pulp on a pie tin or suitable dish. Thoroughly mix the pulp and as rapidly as possible weigh 5 grams to the nearest 10 milligrams on a piece of soft filter paper in a weighing dish. Filter papers used in drip coffee makers are satisfactory. Transfer the weighed sample together with filter paper into the special grinding shell containing one ball bearing. Wipe the weighing dish with a piece of soft filter paper and place this into the shell, followed by the second ball bearing. Pipette exactly 5 ml. of Halowax oil into the shell. Keep shell in vertical position until cap is fastened tightly with wrench to avoid leakage.

Sample Preparation Using Acme Safety Grater. Clean and dry the grater. Cut the avocado lengthwise into homologous (mirror image) halves. A portion of the skin and seed coat on one-half along the larger perimeter is removed and the cut face pressed and moved in a rotary manner across the grater until a fair amount of the avocado pulp is collected on a pie tin or suitable dish below. Always see that depth of grating is equal from stem to calyx end of half-section. After thoroughly mixing the pulp, weigh 5 grams, transfer to the grinding shell, and add exactly 5 ml. Halowax oil as described in the preceding paragraph.

Treatment of the Five Gram Sample in Shell

Clamp the shell containing the 5 gram sample and 5 ml. Halowax oil into the power grinding machine. Operating periods for the different types of shaker devices differ but in any case the resulting paste formed in the shell should be a smooth uniform paste. Upon any evidence of incomplete maceration the sample should be discarded. Large chunks in the weighed pulp may often cause this condition.

Transfer the bulk of the mixture by means of a small spatula to a pie tin or large watch glass and squeeze out the liquid by pressing and kneading with the spatula. The separation is facilitated by gently heating for a short period on a hot water bath. Extended heating must be avoided because Halowax oil is appreciably volatile at the temperature of a hot water bath.

Cool the oil mixture and transfer a few drops to the refractometer prism. Avoid touching hard objects to the prism surface. Follow operating instructions for make of instrument used. Refractometer temperature should have been previously stabilized to 25 degrees C. by means of water circulating through the instrument. A constant temperature circulating system is convenient if available.

Read the index of refraction of the Halowax oil mixture to the fourth decimal figure.

Calculations

Temperature Correction: If the reading is taken at any temperature other than 25 degrees C. a correction must be applied by adding 0.0004 for every full degree above 25 degrees C. or subtracting 0.0004 for every degree below 25 degrees C. Fractions of a degree

to the nearest one-fourth should be compensated accordingly.

Halowax Oil Correction: If the index of refraction of Halowax oil used is less than 1.6353 the difference is added to the reading on the sample; if greater the difference is subtracted from the refractometer reading. The resulting figure is "corrected refractive index." With use of this corrected reading obtain the percent oil in avocado from the table.

Sample Calculation

Reading obtained on refractometer at 24.5 degrees C. = 1.6155
Temperature correction = —0.0002
Reading corrected to 25 degrees C. = 1.6153
Index of refraction of Halowax oil used corrected to 25 degrees C. = 1.6348
Standard correction = (1.6353 — 1.6348) = 0.0005 to be added
Final "corrected refractive index" = (1.6153 + 0.0005) = 1.6158

Reference to Table 4 shows this figure corresponds to 12.1 percent oil in the avocado under examination.

Cleaning of Refractometer

The prism surfaces of the refractometer should be cleaned after each determination by first wiping gently or blotting with either lens paper, clean cotton, or softest facial tissue; then clean with another piece soaked in ether and finally wiping clean with a third piece such that the surface of the measuring prism appears bright.

CHANGE IN REFRACTIVE INDEX OF HALOWAX OIL CAUSED BY THE AVOCADO OIL EXTRACTED
(Based on Halowax Oil No. 1.6353 at 25 Degrees C.)

Corrected refractive index	*Percent oil*	*Corrected refractive index*	*Percent oil*	*Corrected refractive index*	*Percent oil*
1.6281	4.0	1.6218	8.0	1.6159	12.0
.6280	4.1	.6216	8.1	.6158	12.1
.6278	4.2	.6214	8.2	.6157	12.2
.6277	4.3	.6213	8.3	.6155	12.3
.6275	4.4	.6211	8.4	.6153	12.4

Corrected refractive index	*Percent oil*	*Corrected refractive index*	*Percent oil*	*Corrected refractive index*	*Percent oil*
.6273	4.5	.6210	8.5	.6152	12.5
.6272	4.6	.6208	8.6	.6151	12.6
.6270	4.7	.6207	8.7	.6149	12.7
.6269	4.8	.6205	8.8	.6148	12.8
.6267	4.9	.6204	8.9	.6146	12.9
1.6265	5.0	1.6202	9.0	1.6145	13.0
.6264	5.1	.6201	9.1	.6143	13.1
.6262	5.2	.6199	9.2	.6142	13.2
.6260	5.3	.6198	9.3	.6141	13.3
.6259	5.4	.6196	9.4	.6139	13.4
.6257	5.5	.6195	9.5	.6137	13.5
.6255	5.6	.6193	9.6	.6136	13.6
.6254	5.7	.6192	9.7	.6135	13.7
.6252	5.8	.6190	9.8	.6133	13.8
.6250	5.9	.6189	9.9	.6132	13.9
1.6249	6.0	1.6187	10.0	1.6131	14.0
.6247	6.1	.6186	10.1	.6129	14.1
.6245	6.2	.6184	10.2	.6127	14.2
.6244	6.3	.6183	10.3	.6126	14.3
.6243	6.4	.6182	10.4	.6125	14.4
.6241	6.5	.6180	10.5	.6123	14.5
.6239	6.6	.6179	10.6	.6121	14.6
.6237	6.7	.6178	10.7	.6120	14.7
.6236	6.8	.6176	10.8	.6118	14.8
.6234	6.9	.6175	10.9	.6117	14.9
1.6232	7.0	1.6173	11.0	1.6116	15.0
.6231	7.1	.6172	11.1	.6115	15.1
.6229	7.2	.6171	11.2	.6113	15.2
.6228	7.3	.6169	11.3	.6111	15.3
.6226	7.4	.6168	11.4	.6110	15.4
.6225	7.5	.6166	11.5	.6109	15.5
.6223	7.6	.6165	11.6	.6107	15.6
.6222	7.7	.6163	11.7	.6106	15.7
.6220	7.8	.6162	11.8	.6105	15.8
.6219	7.9	.6161	11.9	.6103	15.9

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(1) B. E. Lesley and A. W. Christie, Ind. Eng. Chem. Anal. Ed., Vol. 1, No. 1 (1929) p. 24.

(2) A. F. Shannon, Bulletin, Calif. Dept. of Agriculture, Vol. XXXVIII, No. 3, (1949) p. 127.

(3) Bulletin, Calif. Dept. of Agriculture, Vol. XXXVI, No. 1, (1947) p. 20.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. [redacted] 49

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation,

Appellants,

vs.

W. C. JACOBSEN, Director of the Department of Agriculture of the State of California, GOODWIN J. KNIGHT, Governor of the State of California, and EDMUND G. BROWN, Attorney General of the State of California,

Appellees.

On Appeal From the District Court of the United States for the Northern District of California, Northern Division

ANSWER TO MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

October Term, 1958

No. 820

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation,

Appellants,

vs.

W. C. JACOBSEN, Director of the Department of Agriculture of the State of California, GOODWIN J. KNIGHT, Governor of the State of California, and EDMUND G. BROWN, Attorney General of the State of California,

Appellees.

On Appeal From the District Court of the United States for the Northern District of California, Northern Division

ANSWER TO MOTION TO DISMISS OR AFFIRM

I.

Jurisdiction of This Court Under 28 U.S.C. §1253

The appellees urge that the appeal is not within the jurisdiction of this court because a three-judge district court was erroneously convened to hear the case. No objection was made by appellees to the convening of a three-judge court, nor to the hearing by a three judge-court of appellees' motion to dismiss the complaint. Let alone the

incongruity of an attack by appellees on the composition of the court whose judgment they seek to sustain, the contention is groundless.

Parker v. Brown, 317 U.S. 341, is cited. A three-judge district court held that a marketing program for California raisins, adopted under the California Agricultural Prorate Act of 1940, was an illegal interference with interstate commerce and enjoined enforcement of the program. On direct appeal to this court, the judgment was reversed. There was no question either of the jurisdiction of the district court or of the jurisdiction of the appeal. One contention of the plaintiff was that the California statute was in conflict with the Agricultural Marketing Agreement Act of 1937. A like contention is made in the present case with respect to section 792 of the Agricultural Code of California. When the California Prorate Act was adopted no stabilization program for raisins had been put into effect by the Secretary of Agriculture under the Marketing Agreement Act of 1937. This court said (317 U.S. at p. 353): "We may assume also that a stabilization program adopted under the Agricultural Marketing Agreement Act would supersede the state act."*

Brief comment on the remaining cases cited by appellees is submitted:

Lemke v. Farmers' Grain Co., 258 U.S. 50: Appeal from judgment of Court of Appeals entertained by Supreme Court, after appeal to that court from judgment of three-judge district court; held that in one phase of the

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**Parker v. Brown* has significant bearing upon the merits of the present case, as appears from the analysis of this court's decision made by M. Ramaswamy in his treatise on "The Commerce Clause in the Constitution of the United States," pp. 259-268.

case the constitutionality of the state statute in question was not involved, therefore the case was appealable to the Court of Appeals and then from that court to the Supreme Court. In the companion case of *Lemke v. Homer Farmers' Elevator Co.*, 258 U.S. 65, wherein a three-judge district granted an injunction against enforcement of the state statute, there was a direct appeal to this court and the judgment was affirmed.

Stainback v. Mo Hock Le Lok Po, 336 U.S. 368: Provisions for hearing by three-judge district court, with direct appeal to Supreme Court, held not applicable to the territorial District Court of the United States for the District of Hawaii.

Ex parte Bûder, 271 U.S. 461: No state statute assailed as repugnant to the United States Constitution.

Phillips v. United States, 312 U.S. 246: A three-judge district court was not called for by a claim that the Governor of Oklahoma unlawfully declared martial law in a designated area to stay construction of a dam by Grand River Dam Authority, an agency of the State of Oklahoma. The attack was upon the governor's alleged lawless exercise of authority, not upon the constitutionality of a state statute.

Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., 292 U.S. 386: Not a suit to restrain enforcement of a statute or administrative order by state officers, but only to circumvent action by Oklahoma Packing Co. to recover alleged excess payment for gas, pursuant to an order of the State Corporation Commission directing the gas company to supply gas at a prescribed rate. The order was no longer in effect and no relief was sought against the state officers joined as defendants.

Gully v. Interstate Natural Gas Co., 292 U.S. 16: Assessments were proposed to be made against certain property claimed to be exempt, under a statute authorizing assessments against taxable property that in past years had escaped taxation. A three-judge district court granted an injunction against enforcement of the assessment. *Held*: that there was no question of the constitutionality of the statute, since it authorized assessments only of property that was taxable; and further, that an assessment is not an order of an administrative board or commission, therefore this was not a case for hearing by a three-judge court and direct appeal to the Supreme Court.

Manifestly, no case cited by appellees gainsays jurisdiction of this appeal under 28 U.S.C. §1253.

II.

Existence of Justiciable Controversy

Appellees urge that an adjudication is sought by appellants on a hypothetical question. There is nothing hypothetical about appellants' case. It brings to court an existing tangible controversy that has arisen out of the exigencies of the growing commerce in avocados. The actual experience of appellants has demonstrated that the California statute alleged to contravene the Constitution of the United States substantially interferes with the free flow of interstate commerce in avocados; horticultural research of recent years has established that California's barrier against sale in that state of avocados with less than 8% oil content, as applied to the varieties of avocados grown in Florida, is not a valid standard of maturity or quality. No matter by what motives and assumptions this legislative mandate was originally inspired, the appellants claim, it has come to operate as an arbitrary and inde-

fensible embargo against the sale in California of the Florida avocados of which appellants are handlers.

The actuality of this interference with interstate commerce is concretely revealed by the complaint, answers to interrogatories, oral depositions and documentary exhibits in the record of this case. The persistent attempts of appellants to meet the demand for their avocados in the important California market, in face of the restriction and danger of loss imposed by the 8% oil content requirement, manifests the commercial urgency of access to this market. This need grows more compulsive with the increase of Florida's avocado crop and the sharpening of competition between the Florida fruit and that of California.* At the same time, because the biochemical characteristics of Florida avocados are immutably determined by the native climatic and soil conditions, it is certain that these characteristics will persist, in particular the low ratio of oil content. That the continued enforcement of California's 8% oil content requirement for sale of the fruit in that state will subject the Florida avocados to the same commercial detriment as heretofore experienced is beyond question. To delay judicial consideration of the constitutionality of the challenged California statute, as applied to Florida-grown avocados, is merely to prolong a parochial barrier against sale of mature and wholesome Florida avocados in the principal market for this fruit in the

*Reference is made in appellees' motion (pp. 12-13) to a statement in an affidavit made by S. R. Whipple February 5, 1949, after decision on appellees' motion to dismiss the complaint, that no shipments of avocados grown in Florida had arrived in California from March 1, 1958 to February 5, 1959. No response to this affidavit was deemed necessary by appellants at the time it was filed. It is noted that the 1957-1958 crop of Florida avocados was disposed of by March 1, 1958, and that the winds and frosts of early 1958 decimated the 1958-1959 crop.

United States, with consequential detriment to the marketing of this fruit in competition with the California-grown fruit in all other states.

In *United Public Workers v. Mitchell*, 330 U.S. 75, cited by appellees, it was held as to the appellants other than Poole that the complaint alleged only a desire to engage in political activities prohibited by the Hatch Act, leaving to surmise what public statements they proposed to make and the circumstances of publication. Here there is no such uncertainty or call for surmise. The avocados proposed to be shipped by appellants for sale in California are those preponderantly grown in Florida, avocados that attain maturity with less than 8% oil content, as determined by scientifically valid maturity standards. Furthermore, since the adoption in 1954 of the federal program for the marketing of Florida avocados, and so long as this program remains in effect, the avocados to be marketed by appellants in California must necessarily be in compliance with the maturity and quality standards established by the orders issued by the Secretary of Agriculture pursuant to the authority vested in him by the Agricultural Marketing Agreement Act of 1937. That such avocados, shipped to California, will be tagged as nonconforming and destroyed as a public nuisance unless removed from the state, remains certain so long as section 792 of the California Agricultural Code continues to be enforced. This is no "hypothetical fear," but an actuality evidenced by costly experience. A concrete legal remedy is applicable, a declaration of unconstitutionality of the state law as applied to appellants' shipments of avocados as aforesaid and if needed an injunction restraining such further enforcement.

In *Public Commission of Utah v. Wycoff Co., Inc.*, 344 U.S. 237, wherein it was held that respondent's action for

declaratory judgment should be dismissed, the several reasons for this holding are inapplicable to the present case. Wycoff Co. held a certificate of authority from the Interstate Commerce Commission for the transportation of moving picture films and newsreels from Salt Lake City to points in Utah, Idaho and Montana and sought an adjudication that its carriage of films between points within the state of Utah constituted interstate commerce because integrated with the interstate movement of the films. Such adjudication was desired not because of any action theretofore taken by the Utah Commission to subject the transportation to regulation by the Commission, but to forfend against anticipated future action. This court said that there was no evidence of any past, pending or threatened action by the Commission touching the business of the respondent in any respect, nor any showing of what action the Commission might take under a specific set of circumstances. Quoting from the opinion at page 244: "The complainant in this case does not request an adjudication that it has a right to do, or to have, anything in particular. It does not ask a judgment that the Commission is without power to enter any specific order or take any concrete regulatory step." And at page 245: "This dispute has not matured to a point where we can see what, if any, concrete controversy will develop. It is much like asking a declaration that the State has no power to enact legislation that may be under consideration but has not yet shaped up into an enactment. If there is any risk of suffering penalty, liability or prosecution, which a declaration would avoid, it is not pointed out to us."

The present case, by contrast, deals with a statutory mandate that leaves no leeway for interpretation and that has been enforced against appellants over the course of

several years and, is certain to continue to be enforced in the same manner if not enjoined. The detrimental effect of such enforcement upon the marketing of Florida avocados is indicated by the allegations of the complaint and the depositions ready to be offered in evidence by petitioners. Also shown is the conflict with the federal program for the marketing of the Florida avocados involved in continued enforcement of the challenged statutory provision. The declaration of rights sought by appellants is precisely set forth in the prayers of the complaint, likewise the injunctive relief to follow such declaration. In every respect, it is submitted, the present case meets the requirements for declaratory judgment stated in the decisions of this court.

III.

Substantiality of Complaint

Appellees argue that appellants' claim is insubstantial because only a small percentage of the avocados shipped by appellants to California has been barred from sale in that state; also because loss to appellants is avoidable by "reconditioning" rejected loads.

Ignored entirely is the restriction of appellants' shipments to California to the minor part of the Florida avocados that may at times attain 8% oil content. The total volume shipped to California is swelled by the adventitious experience of the appellant Florida Lime and Avocado Growers, Inc. in the 1954-55 season. In that season, as appears from PX 20, this appellant shipped to California 12,681 bushels of avocados out of a total of 47,954 bushels handled and, so far as ascertained when depositions were taken in Miami, all of these shipments passed the California oil test. However, as testified by Fred Pioway

(Depositions, p. 260), the oil tests then made were of a composite sample, so that the result was automatically an average of the avocados making up the sample. In the subsequent seasons the testing has been of the sample fruits individually and failure even of a single avocado to meet the oil test could result in condemnation of the whole load as nonconforming.*

No doubt encouraged by the 1945-55 experience, Florida Lime and Avocado Growers, Inc. shipped to California 10,806 bushels of avocados out of the total of 59,543 bushels handled in the 1955-56 season (PX 20), with the disastrous results shown in exhibit 21 and the oral testimony of Fred Plowaty. (Depositions, 255-256, 274.) In the next two years, the avocado shipments of said appellant to California dwindled to 3,415 and 2,538 bushels.

Since the federal marketing agreement for Florida avocados became effective June 11, 1954, the Secretary of Agriculture has assigned permissible picking dates for each of 45 named varieties of Florida avocados. Only one of these varieties, the Lula, attains 8% oil content in volume sufficent for shipment to California, although at least a dozen other varieties are produced in volume substantial enough for such shipments, if not precluded by the California oil test. But even as to the Lula avocados, 8% oil content is not attained until late in the marketing

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*Plaintiffs' exhibits 21 and 22 furnish a striking illustration. Out of a load of 1874 boxes of avocados shipped by Florida Lime and Avocado Growers, Inc. to California on November 15, 1957, of which 900 boxes were consigned to Williams and Sons Produce Co. at Los Angeles, the sizes 16s and 18s unloaded at Los Angeles, totaling 361 boxes, were tested as separate lots and tagged as nonconforming, although the five 16s used as samples averaged 8.59% oil content and the five 18s averaged 8.29%.

season, and then never with the certainty and consistency to assure passing of the California oil test and delivery to a buyer at scheduled time.

As to the suggested "reconditioning" of a load of Florida avocados tagged in California as nonconforming for lack of 8% oil content, appellees say repeatedly that this can be done by removing the nonconforming fruits. Unfortunately, the suggestion is vacuous. First, there is no warrant in section 792 of the Agricultural Code of California, or in the administrative regulations, for repeated oil tests of the same lot of avocados after removal of the samples tested and found to be nonconforming. Second, whatever may be true of other produce, or of other grounds of failure to meet statutory standards, oil content of avocados cannot be determined visually but only by maceration and laboratory test, as set forth in appellees' motion at pp. 24-30, and it is not indicated how "nonconforming" fruits can successfully be chosen for removal by any other procedure. Third, even if a local grower could go back to his nearby grove with a wagon load of avocados rejected for failure to meet the oil test and visually determine what fruits to remove and what other fruits to substitute for a new oil test, such procedure is not available to a grower or handler who sends a refrigerated truckload of Florida avocados across the continent to California.

Equally vacuous is the suggestion that section 385 of the California Agricultural Code affords effective remedy in case of rejection in California of a shipment of Florida avocados. All that is provided by section 385, with respect to perishable fruit such as avocados, is procedure for immediate destruction of the fruit tagged as nonconforming unless it can be forthwith "reconditioned." Contrary to the statement made at page 6 of appellees' motion, section

385 contains no provision for the filing of a petition by the owner in the Superior Court of California for an order authorizing the marketing of avocados, or other perishable fruit. Nor could the owner of perishable fruit compel or "invite" the California authorities to file a petition in the state court for abatement of the avocados as a public nuisance. The petition authorized to be filed in the state court by the Director of Agriculture (last two paragraphs of section 385) relates only to non-perishable agricultural products. (Jurisdictional Statement, Appendix pp. 8-9.)

To promote the profitable interstate marketing of Florida avocados, in the interest of the national economy, the federal government has set up a marketing program for these avocados of the kind set forth in appellants' complaint. This program cannot effectively serve its purpose if the respondents in this case are permitted to continue to bar the Florida avocados from the most important market for avocados in this country and to keep the growers and handlers of Florida avocados at constant disadvantage in competition with the growers and handlers of California avocados. The substantiality of appellants' complaint, it is submitted, is beyond question.

Respectfully submitted,

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Attorney for Appellants.